IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN,UNDER ARBITRATION ACT. No 10 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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RAJ TRISHUL CONSTRUCTION CO.

Versus

STATE OF GUJARAT

Appearance:

1. PETN,UNDER ARBITRATION ACT. No. 10 of 2002

MR HK PARMAR for Petitioner No. 1

MR PREMAL JOSHI, AGP for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 06/09/2002

ORAL JUDGEMENT

1. Heard ld.counsel Mr. H.K. Parmar for the petitioner and ld. AGP Mr. Premal Joshi for respondent.

2. The petitioner has filed this petition for appointment of a Sole Arbitrator for adjudication of the dipustes and differences and especially claims raised by the petitioner in the statutory notice served and as averred in para-4 of the petition. The petitioner has raised five different claims and it is contended that though there is no formal written agreement between the parties, the cause of action has arisen on the day when the tender of the petitioner was accepted by the Executive Engineer, National Highway Division, Rajkot (hereinafter referred to as respondent no.2) and on the day when acceptance letter was issued by respondent no.2 in favour of the petitioner and also on the day when respondent/department has committed breach of the contract and, therefore, the disputes between the parties require to be referred to the Arbitrator for adjudication and resolution, in view of the condition of tender agreement floated by the State of Gujarat.

3. This application is resisted by the respondents by filing affidavit-in-reply dated 10.5.2002. Certain preliminary objections were raised as to the maintainability of this petition and it is contended that the petitioner company and respondents have not entered into any valid contract as contemplated in Chapter : II of the tender papers and that there is no letter of acceptance in any form issued to the petitioner and Fixed Deposit or Security Deposit is also taken from the petitioner by the department. He has no authority whatsoever to claim any damage or to raise any type of claim against respondents and, therefore, petition should be rejected being totally misconceived. According to the respondents, the petitioner has tried to misuse the process of law by filing this petition. It is also contended that before the tender could be accepted formally and agreement can be entered into between the parties, the State decided to collect the toll tax with computerised system and under the bonafide decision,tender offered by the petitioner was rejected. The petitioner, according to the respondents, therefore cannot challenge the said administrative decision taken bonafide and with a view to install better facilities for toll tax collection as there was neither acceptance of the offer of the petitioner nor a valid contract between the parties.

4. The State of Gujarat (Respondent No.1) through Respondent No.2 had invited tenders publically for the appointment of an Agency to collect toll tax levied on motor vehicles etc. passing from Toll Plaza near Vanakbori Junction on Ahmedabad Kandla National Highway

No.8-A, KM 171-0 to 183-0. The petitioner was one of the claimant and its tender offer was accepted and thereafter respondent no.2 intimated the petitioner that the petitioner has decided to recover toll tax by a computerised system with effect from 1.4.2001 and acceptance of tender for recovery of the toll tax manually is cancelled/rejected.

5. Mr. Parmar, ld. counsel appearing for the petitioner has pointed out that though there is a formal agreement between the parties, but he was conveyed about the acceptance of the tender, not only orally, but also indirectly in writing by respondent no.2 i.e. the officer who has invited the tenders for the State of Gujarat. In support of his submission, Mr. Parmar produced a letter dated 19.9.2000 Annex.A P.43 and averred that dissatisfaction recorded by respondent no.2 clearly indicates that irregular payment of instalments in connection with some other contract has resulted into the subsequent decision of cancellation of the tender accepted by the State Government. Document Annex.B P.44 is dated 13.3.2001. So, according to the petitioner, dispute which requires to be referred to the Arbitrator exists and in view of the scheme of the Act, the Arbitrator requires to be appointed. Arbitrator can also be asked to examine the maintainability of the claims or existence of the arbitration agreement between parties.

6. Mr. Parmar, ld. counsel appearing for the petitioner has placed reliance on the decision in the case of M/s Prahlad Singh Mulakh Raj v/s Union of India & Others, 1986(1) Arbitration Law Reporter P.428 wherein the Delhi High Court has propounded the principle that a formal contract is a mere formality and merely because the same was not executed, it would not mean that a final and binding contract had not come into existence. Delhi High Court was dealing with the petition under Section 22 of the Arbitration Act, 1940. In the cited decision, the tender was accepted and the very tender was containing arbitration clause. There was no formal contract signed between the parties and the question whether there was a concluded contract between the parties or not was under scrutiny and the Court held that the execution of the contract is a mere formality. The other decision cited by Mr. Parmar is in the case of M/s Progressive Construction Ltd. v/s Bharat Hydro Power Corporation Ltd., 1995(2) Arbitration Law Reporer P.233, wherein also Delhi High Court propounded the principle that the contract is complete when there is acceptance of tender. Of course, the Court was dealing with the point of jurisdiction as the alleged contract was breached by one party. In the cited decision, ld. counsel appearing for

one of the parties namely the petitioner has ably convinced the Delhi High Court that acceptance of a tender is enough though there is no formal document signed by both the parties. Delhi High Court has referred the decision of Calcutta High Court in the case of A.K.Raha Ltd. v/s State of Punjab, reported in AIR 1661 Calcutta 166, wherein it has been held that:-

> " In the case Government contracts by acceptance of a tender the contract is complete by acceptance of tender and communication of acceptance is not necessary. The Communication of acceptance at the particular place cannot be considered to be one of the bundle of essential facts to be proved in establishing the making of the contract."

7. The document Annex.D page-46 and Annex.E P.47 are two important documents. One is a letter dated 29.12.2000 addressed to respondnet no.2 by one of the partners of the petitioner and the second one is dated 28.2.2001 addressed to the same authority by the petitioner. Existence of these two documents produced with rejoinder affidavit is not disputed. In both these letters, the petitioner has extended time limit. Both these letters bear small initials wherein it is specifically contended that the contractor whose tender was accepted by respondent, is enlarging the time so that respondent no.2 can handover the toll booth to the contractor and can complete the formalities as per the tender agreement. Affiavit-in-sur rejoinder on behalf of the respondent filed by the very officer who has filed affidavit-in-reply, is silent qua these two letters. I am afraid that the letter dated 19.9.2000 Annex.A P.43 also must have been signed by the very officer. Without going into the aspect as to who has signed the letter dated 19.9.2000, P.43, it is clear that the say of the petitioner requires to be scrutinised in reference to the claim raised in the petition by the arbitrator. Mr. Parmar has rightly placed reliance on the decision of this Court in the case of Gujarat State Fertilizers Co.Ltd. v/s H.J. Baker & Bros., reported in 2000(1) GLR P.159, wherein this Court, while dealing with the provisions of Sec.7 of the Contract Act, has held that the contract can be inferred even from the correspondence. In the cited decision, the Court has held that "in the case on hand, the contract came into existence through tender notice. Tender is nothing, but invitation to offer. In response to such tender offer was made by the respondent No.1. The offer was accepted with certain modifications by the revisionist. It is

very difficult to accept at this stage that there was no concluded contract."

8. Arbitrator, in view of the provisions of Sec.16 of the Arbitration & Conciliation Act, 1996 can examine the question whether there was a concluded contract between the parties or not before adjudicating upon the actual claim raised by the petitioner.Everything should be left to the arbitrator and mode of resolution of disputes between the parties can be selected by the Arbitrator himself.

9. Ld. AGP Mr. Premal Joshi has not suggested any name of the Arbitrator. Accoding to Ld. counsel Mr. Parmar, the disputes should be referred to the Sole Arbitrator preferably to a Retired Judge of this Court, but in view of Annex.C Page-25, I direct to refer to all the disputes to the Dispute Resolution Committee (DRC) mentioned in Clasue 26 of the tender agreement consisting of three members headed by Chief Engineer (NH) & Jt. Secretary (R & B) Department, State of Gujarat, Regional Officer, M.D.S.T., Gandhinagar and One Nominee of the agent as a member. Ld. counsel Mr. Parmar has submitted that in view of the legal issues involved in the matter, a responsible Sole Arbitrator should be nominated. However, it is always open to the petitioner to appoint one Nominee who is conversant with the relevant legal provisions. I am told that the petitioner has already named that nominee. However, he may substitute or change the nominee also. Only on this ground, appointment of a Sole Arbitrator is not found warranted.

10. In the result, Dispute Resolution Committee (DRC) is hereby appointed as an Arbitrator and disputes raised in the statutory notice as well as in this petition are referred to the " Committee"/ Arbitrator. However, the Arbitrator shall hear and arbitrate upon the disputes raised in this petition and after completing the arbitral proceedings, shall pass final and reasoned award. The Arbitrator is authorised to act on an ordinary copy of the minutes authenticated by the Advocates for the parties.

11. Petition stands allowed accordingly.

6.9.2002 [C.K. BUCH, J]

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